



## **POSTAL REGULATORY COMMISSION**

### **39 CFR Parts 3006 and 3011**

**[Docket No. RM2023-6; Order No. 6451]**

**RIN 3211-AA35**

#### **Non-public Materials**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission is proposing revisions to existing rules on non-public materials and revisions to existing rules on the Freedom of Information Act (FOIA). This document informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* April 6, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER**

**INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

#### **SUPPLEMENTARY INFORMATION:**

##### **Table of Contents**

- I. Background
- II. Basis of the Proposed Rules
- III. Proposed Rules

##### **I. Background**

In conducting the foreign policy of the United States with respect to international postal services and international delivery services, the Secretary of State must coordinate with applicable government agencies, including the Commission, under 39 U.S.C. 407(b)(2)(A). Such coordination about foreign affairs requires timely, free, and frank flow of information between government agencies. The Secretary of State exercises “primary authority for the conduct of foreign policy with respect to international postal services and international delivery services.” 39 U.S.C. 407(b)(2)(A). In exercising this authority, the Secretary of State “shall coordinate with other agencies as appropriate” and “shall give full consideration to the authority vested by law or Executive order in the Postal Regulatory Commission.” *Id.* Flowing from this authority, the U.S. Department of State (DOS) coordinates continuous and frequent information sharing among the relevant government agencies. As a routine part of this intragovernmental coordination, the agencies share materials with each other that may contain information that should be accorded non-public treatment.

In other contexts, such exchange of non-public materials might implicate the Commission’s existing regulations in 39 CFR part 3011 of this chapter that govern procedures when any submitter provides non-public materials to the Commission and seeks non-public treatment, and when a third party seeks access to or disclosure of such non-public materials. It might also implicate the Commission’s existing regulations in 39 CFR part 3006 of this chapter that govern procedures regarding FOIA requests for Commission records.

## **II. Basis of the Proposed Rules**

After experience with its rules, the Commission is concerned that the existing regulations on non-public materials might not set sufficiently clear expectations about those regulations’ interaction with Executive Branch policy-

making processes. Absent such clarity, Executive Branch stakeholders might be wary of engaging in the free flow of information between relevant parties during the DOS coordination activities under 39 U.S.C. 407(b)(2)(A) aimed at advising on U.S. foreign postal policy in a timely manner. To assure the free flow of information and streamline the Commission regulations that may impact activities under the coordination of the DOS, the Commission proposes to explicitly exempt non-public materials submitted to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A) from its rules in 39 CFR part 3011 of this chapter. Relatedly, the Commission also proposes clarifying revisions to its rules in 39 CFR part 3006 of this chapter regarding FOIA requests.

The Commission's authority to regulate certain non-public materials provided by the Postal Service stems from 39 U.S.C. 504(g). Section 504(g) is triggered if the Postal Service determines that any material it provides to the Commission under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under Title 39, contains non-public information. 39 U.S.C. 504(g)(1). After the Postal Service provides such a determination to the Commission, the Commission then has specific authority under 39 U.S.C. 504(g)(3) to regulate the public disclosure of or access to such non-public materials. See 39 U.S.C. 504(g)(3). The scope of 39 U.S.C. 504(g)(1) plainly does not apply to the Commission's receipt of non-public materials provided by government agencies other than the Postal Service in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A). It also does not apply to the Commission's receipt of non-public materials provided by the Postal Service in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A), because the Postal Service

would provide such materials voluntarily or at the request of the coordinating authority (*i.e.*, the DOS) rather than pursuant to a Commission subpoena or otherwise at the request of the Commission in connection with a proceeding. Therefore, it is consistent with 39 U.S.C. 504(g) to exempt non-public materials received by the Commission from any person in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A) from the rules in 39 CFR part 3011 of this chapter.

The Commission's authority to regulate non-public materials provided by the Postal Service outside the context of 39 U.S.C. 504(g) and any materials provided by any other person stems from 39 U.S.C. 503. This provision grants the Commission general authority to take actions, such as issuing rules and regulations, that are "necessary and proper" to carry out its "functions and obligations" under Title 39 of the United States Code. 39 U.S.C. 503. Therefore, the Commission has broad discretion to determine the boundary of its regulations' applicability to materials outside the context of 39 U.S.C. 504(g).

In addition, the Commission's role in the coordination activities as part of the foreign postal policy deliberative process under 39 U.S.C. 407(b)(2)(A) is subordinate to the DOS's leadership and decision-making authority. The Commission's receipt of non-public materials in this context is different from a Commission request for information in a regulatory proceeding over which the Commission presides. To facilitate the swift exchange of information among all agencies involved in the deliberative process and harmonize Commission application of the statute, the Commission deems it reasonable to explicitly provide that non-public materials submitted in this specific context are exempt from the requirements of 39 CFR part 3011 of this chapter.

#### **IV. Proposed Rules**

*Proposed § 3006.30(d).* Proposed § 3006.30(d) is revised to exempt non-public materials submitted by the Postal Service to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the applicability of the rules in 39 CFR part 3011 of this chapter.

*Proposed § 3006.30(e)(1).* Proposed § 3006.30(e)(1) is revised to state that if the Commission receives a FOIA request for records submitted by a person other than the Postal Service, the Commission shall adhere to the applicable procedures of the proposed § 3006.35, and if the Commission does not refer such a FOIA request to another Federal agency pursuant to proposed § 3006.35(b), the Commission shall consider the FOIA request in light of all applicable exemptions, after notifying the submitter of the FOIA request and providing the submitter with an opportunity to respond.

*Proposed § 3006.35.* Proposed § 3006.35 is added to detail the procedures that the Commission should follow for consultation, referral, and coordination with other Federal agencies with regard to certain FOIA requests, and for FOIA requests that involve classified information. It also provides for the timing of responses to FOIA consultations and referrals received by the Commission, and the Commission's ability to establish agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

*Proposed § 3006.70(a).* Proposed § 3006.70(a) is revised to exempt a person other than the Postal Service from following the procedures described in subpart B of 39 CFR part 3011 of this chapter when the person submits non-public materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

*Proposed § 3011.100(c).* Proposed § 3011.100(c) is added to exempt non-public materials submitted by any person to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the applicability of the rules in 39 CFR part 3011 of this chapter, with three exceptions. First, certain persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A). Second, any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205. Third, non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following: (i) non-public materials provided by the Postal Service to the Commission pursuant to a subpoena; (ii) non-public materials filed in response to an information request; (iii) non-public materials filed in compliance with any applicable Postal Service reporting required under 39 CFR part 3050 or part 3055 of this chapter; and (iv) non-public materials filed in a Commission docket.

*Proposed § 3011.103(a).* Proposed § 3011.103(a) is revised to clarify that the inadvertent failure of a submitter to concomitantly provide all documents required by existing § 3011.200(a) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission.

By the Commission.

**Mallory Richards,**

*Attorney-Advisor.*

## List of Subjects

### 39 CFR Part 3006

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

### 39 CFR Part 3011

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of the Federal Regulations as follows:

## **PART 3006—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT**

1. The authority citation for part 3006 is revised to read as follows:

**Authority:** 5 U.S.C. 552; 39 U.S.C. 407, 503, 504.

2. Amend § 3006.30 by revising paragraphs (d) and (e) to read as follows:

**§ 3006.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.**

\* \* \* \* \*

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. Except when the Postal Service submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A), in all other instances that the Postal Service submits materials to the Commission that the Postal Service reasonably

believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in part 3011, subpart B of this chapter.

(1) A request made pursuant to FOIA for Postal Service records shall be referred to the Postal Service; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by the Postal Service shall be considered under the applicable standards set forth in that part.

(e) *Requesting a record submitted under seal by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records submitted by a person other than the Postal Service shall adhere to the applicable procedures of § 3006.35 and if not referred to a different Federal agency pursuant to § 3006.35(b), shall be considered in light of all applicable exemptions, after notifying the person of the FOIA request and providing the person with an opportunity to respond; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

3. Add § 3006.35 to read as follows:

**§ 3006.35 Consultation, referral, and coordination.**

(a) *Consultation.* If records originated with the Commission but contain within them information of significance to another Federal agency or office, the Commission will typically consult with that other entity prior to making a release determination.



(b) *Referral.* In addition to referring all requests made pursuant to FOIA for Postal Service records to the Postal Service as specified by § 3006.30(d)(1), if the Commission believes that a different Federal agency is best able to determine whether to disclose the record, the Commission will typically refer responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever the Commission refers any part of the responsibility for responding to a request to another agency, the Commission will notify the requester of the referral, including the name of the agency and that agency's FOIA contact information.

(c) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Commission locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Commission will coordinate with the originating agency to seek its views on disclosure of the record. The Commission then will

notify the requester of the release determination for the record that is the subject of the coordination.

(d) *Classified information.* On receipt of any request involving classified information, the Commission will determine whether the information is currently and properly classified in accordance with applicable classification rules.

Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

4. Amend § 3006.70 by revising paragraph (a) to read as follows:

**§ 3006.70 Submission of non-public materials by a person other than the Postal Service.**

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in part 3011, subpart B of this chapter, except when the submitter submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

\* \* \* \* \*

## **Part 3011—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION**

5. The authority citation for part 3011 is revised to read as follows:

**Authority:** 39 U.S.C. 407, 503, 504.

6. Amend § 3011.100 by adding paragraph (c) to read as follows:

### **§ 3011.100 Applicability and scope.**

\* \* \* \* \*

(c) *Exemption.* Except for the circumstances described in paragraphs (c)(1) through (c)(3) of this section, the rules in this part do not apply to any non-public materials (and the non-public information contained therein) provided to the Commission by any person in connection with activities under 39 U.S.C. 407(b)(2)(A).

(1) The following persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials (and the non-public information contained therein) provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

(i) Members of the Commission;

(ii) Commission employees; and

(iii) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts) assisting the Commission in carrying out its duties.

(2) Any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205.

(3) Non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following:

(i) Non-public materials provided by the Postal Service to the Commission pursuant to a subpoena issued in accordance with part 3013 of this chapter;

(ii) Non-public materials filed in response to an information request issued in accordance with § 3010.170 of this chapter;

(iii) Non-public materials filed in compliance with any applicable Postal Service reporting required under part 3050 or part 3055 of this chapter; and

(iv) Non-public materials filed in a Commission docket.

7. Amend § 3011.103 by revising paragraph (a) to read as follows:

**§ 3011.103 Commission action to determine non-public treatment.**

(a) The inadvertent failure of a submitter to concomitantly provide all documents required by § 3011.200(a) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Information requests as described in § 3010.170 of this chapter, preliminary notices, or interim orders may be issued to

help the Commission determine the non-public treatment, if any, to be accorded to the materials claimed by any person to be non-public.

\* \* \* \* \*

[FR Doc. 2023-04978 Filed: 3/10/2023 8:45 am; Publication Date: 3/13/2023]